No. 3866.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY MABRY,
Appellant,
vs.
GEORGE D. BEAUMONT, as United States Marshal,
Appellee.

APPLICATION FOR HABEAS CORPUS.

Brief and Argument for Appellant

WICKERSHAM & KEHOE,
Attorneys for Appellant.
Juneau, Alaska.

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STATEMENT OF THE CASE

The appellant was accused of "a violation of the Alaska Bone Dry Act, Pub. No. 308," by taking a drink of "moonshine whiskey" with some friends, in S. S. Thornton's residence, at Sitka, Alaska, on December 1, 1921; on complaint of the Ass't U. S. Attorney, at Sitka, Alaska, he was arrested, tried before a jury, found guilty and sentenced to Four (4) months imprisonment in the jail at Sitka, and to pay a fine of Six Hundred ($600.00) dollars, and costs amounting to Ninety-Three and 55-100

($93.55) dollars, and to be confined in jail till the fine and costs are paid.

The record shows it was his first conviction. After a futile attempt to secure an appeal to the district court, defendant applied to the district court for the First Division, at Juneau, Alaska, in a habeas corpus proceeding, praying to be discharged from confinement because the justice who tried and sentenced him had no jurisdiction to cause his arrest and trial, and because the judgment entered is void for want of jurisdiction.

On the motion to dismiss his attempted appeal from the justice court the judge of the district court entered an order affirming the judgment and sentence in the justice court; appellant objects to that affirmation as also void for want of jurisdiction, because all the proceedings in the justice court upon which it is based, being void for want of jurisdiction, there was no jurisdictional basis for affirmance.

The appellant will rely upon the following errors assigned by him in this case:

I.

The court erred in discharging the writ of habeas corpus and in making the order remanding this appellant to restraint and imprisonment as therein set out.

II.

The court erred in holding the complaint in this case made by the special assistant U. S. attorney on January 9th, 1922, before the justice court at Sitka, Alaska, and upon which this appellant was arrested, was sufficient or any authority to confer any jurisdiction on said justice of the peace to issue

any warrant for the arrest of the appellant, or to put him on trial for any offense against the act of Congress approved Feb. 14, 1917, entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," or to render the, or any, judgment against the appellant under any charge for a violation of said act of Congress, or to order his imprisonment in any jail or any place, or to make the pretended judgment of January 9th, 1922, so pretended to be made by said justice in this case.

III.

The court erred in holding that said complaint states any crime under said act of Congress, or gave said justice or district court any jurisdiction over the person of this appellant; that said complaint does not state any probable cause on sworn information.

IV.

The court erred in adjudging that that justice court in Sitka precinct, first division, Alaska, had jurisdiction to make the pretended judgment of January 9th, 1922, and the docket judgment of the same date therein, because it appears upon the face of said judgments, and each of them, that it was null and void for want of jurisdiction in said justice court to make and enter the same.

V.

The court erred in holding that the pretended judgments set out in full in the return of the United States Marshal, defendant, in this case, as his warrant and authority for restraining and imprisoning this appellant, as herein complained of, were either

or both sufficient and valid, or any legal authority to the said Marshal so to restrain this appellant of his liberty or to imprison him in said jail at Juneau, Alaska, or any where, or at all.

VI.

The court erred in adjudging that the imprisonment of this appellant by the said United States Marshal, defendant herein, upon the said pretended authority set out by him in his return in this case to the writ of habeas corpus, was legal, and that the proceedings in said justice court whereby the said judgments were so made, were legal and in compliance with law, because it appears upon the face of the petition in this case, the writ, the return of the writ, and upon the whole record before the court: (1) That the said R. W. DeArmond, Commissioner and ex-officio justice of the peace in said Sitka precinct, first division, Alaska, as aforesaid, had no jurisdiction or authority in law or otherwise, to render and make the pretended judgment so by him made and rendered in this case against the appellant on said January 9th, 1922, as aforesaid, because the said judgment is not based upon any crime defined by or known to the laws of the United States, or the Territory of Alaska, and the pretended crime stated therein is not a crime known to or defined by said or any laws. (2) Said pretended judgment of January 9th, 1922, as aforesaid, being void for want of jurisdiction, and being so made in excess and outside of the jurisdiction of the said justice court, as aforesaid, all subsequent proceedings of said justice court, and of the district court, based thereon, were each without jurisdiction and wholly void. (3) Said pretended

judgment of January 9th, 1922, as aforesaid, being void for want of and in excess of the jurisdiction of the said justice court, all subsequent proceedings thereunder, both in said justice court and in this district court, and the imprisonment and restraint of this appellant were and now are in violation of law and of this appellant's rights under the Fifth Amendment to the Constitution of the United States. (4) The complaint in said case against this appellant, made and verified on said 9th day of January, 1922, by H. D. Stabler, special assistant U. S. attorney, was so made in violation of the provisions of Section 28 and other provisions of the act of Congress entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," approved Feb. 14, 1917, 39 Stat. L. page 903, and was made without authority of law and in violation of said law and did not state facts sufficient to constitute any crime, or to give the said justice court jurisdiction to try and sentence this appellant as in said record stated. (5) That the pretended warrant so issued by the said Commissioner and ex-officio justice of the peace in the Sitka precinct, as aforesaid, on said January 9th, 1922, for the arrest of this appellant and upon which he was so arrested and restrained of his liberty, and so attempted to be brought within the jurisdiction of the said justice court, was and is void and illegal in this: that it is in direct violation of Section 2384, Compiled Laws of Alaska, 1913, because it did not and does not now state or designate any crime therein alleged to have been committed by this appellant, and because the said deputy marshal

had no authority to thereby arrest or to detain or imprison this appellant, and his said arrest and imprisonment thereunder and his detention in said court were illegal because said warrant was void and in violation of law. (6) That the pretended verdict rendered by the jury against this appellant in said justice court was and is null and void because it does not find the defendant guilty of any crime, and the same did not afford any jurisdiction to the pretended judgment and sentence so entered by the said justice of the peace thereon. (7) Because the pretended judgment so entered by the said justice of the peace in the case against this appellant, as aforesaid, was null and void for the further reason that it provided that this appellant should be imprisoned in jail at Sitka until the costs of said case were paid; and that part of the said pretended judgment providing for his said imprisonment for costs has been imposed upon this appellant and the said judgment is wholly null and void for that reason also. (8) Because the docket entries in the case against the appellant herein kept by the said justice of the peace and made a part of his petition show that the pretended crime charged against appellant and upon which the jury so returned said verdict, and the justice so rendered said pretended judgment and sentence, was not a crime, and that the said court had no jurisdiction to render any judgment and sentence against this appellant thereon or at all. (9.) Because it appears on the face of the pretended judgment aforesaid, entered by the justice in said justice court on January 9th, 1922, against appellant that said justice had no jurisdic-

tion or authority to sentence appellant to be imprisoned in jail four months, and an additional 300 days, as therein stated, because said periods exceed the jurisdiction of said justice of the peace to impose imprisonment, and said sentence was null and void. (10) Because it appears on the face of the order of the district court in this case dismissing appellant's appeal from the said justice court to the said district court, as herein described, was without authority of law, and the affirmance of the said pretended judgment of the said justice of the peace of January 9th, 1922, as aforesaid, was without jurisdiction and void, and all proceedings and orders entered in said cause in said district court, as aforesaid, were null and void and without jurisdiction. (11) That the order of said district court so made on March 16th, 1922, directing the issuance of a bench warrant for the arrest and imprisonment of this appellant was in excess of the jurisdiction of the said district court and its judge, and null and void, and the arrest and imprisonment of this appellant being made and done under that warrant, was so done without jurisdiction and is null and void. (12) That the pretended imprisonment of this appellant under said pretended judgment of January 9th, 1922, and the said pretended bench warrant so issued by said district court upon which this appellant was so arrested on March 24th, 1922, and is now imprisoned, was and is illegal and without jurisdiction or authority of law, and the said United States Marshal, defendant herein, is wholly without authority of law in restraining this appellant and imprisoning him as aforesaid.

POINTS AND AUTHORITIES

1. Alaska Statutes re Habeas Corpus.

Citations to Chapter 57, Compiled Laws of Alaska, 1913, p 537.

"Sec. 1398. Every person imprisoned, or otherwise restrained of his liberty, within the district, under any pretence whatsoever, except in the cases specified in the next section, may prosecute a writ of habeas corpus according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal to be delivered therefrom.

"Sec. 1399. Persons properly imprisoned or restrained by virtue of the legal judgment of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution regularly and lawfully issued upon such judgment or decree, shall not be allowed to prosecute the writ.

"Sec. 1410. The court or judge before whom the party shall be brought on such writ shall, immediately after the return thereof, proceed to examine into the facts contained in such return and into the cause of the imprisonment or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not.

"Sec. 1411. If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, the court or judge shall discharge such party from the custody or restraint under which he is held.

"Sec. 1412. It shall be the duty of the court or

judge forthwith to remand such party if it shall appear that he is legally detained in custody.

"Sec. 1413. If it appear on the return that the prisoner is in custody by virtue of an order or civil process of any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such prisoner shall be discharged in either of the following cases:

First. When the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person;

Second. When, though the original imprisonment was lawful, yet by some act, omission, or event which has taken place afterwards the party has become entitled to be discharged;

Third. When the order or process is defective in some matter of substance required by law, rendering such process void;

Fourth. When the order or process, though in proper form, has been issued in a case not allowed by law;

Fifth. When the person having the custody of the prisoner under such order or process is not the person empowered by law to detain him; or,

Sixth. When the order or process is not authorized by any judgment of any court nor by any provision of law.

"Sec. 1422. If it appear that the party detained is illegally imprisoned or restrained, judgment shall be given that he be forthwith discharged; otherwise judgment shall be given that the proceeding be dismissed and the party remanded.

2. Habeas Corpus a Statutory Remedy.

In Ex parte Siebold, 100 U. S. 371; 25 L. Ed. 717, the court said:

"The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such other court over the person or the cause, or some other matter rendering its proceedings void."

The power and authority to issue the writ of habeas corpus in the states is generally provided by the constitution or the laws of each particular state, and the manner of the exercise of such power is also generally the subject of legislative grant.

Bailey on Habeas Corpus. Vol. 1, Sec. 26.

The Alaskan statutes on habeas corpus were enacted by Congress in the code of civil procedure by the Act of June 6, 1900, 31 Stat. L. 423; by the subsequent act of Congress of August 24, 1912, creating the Alaska Legislature and conferring power to legislate. This latter body was given the power to alter, amend, modify or repeal those and all other sections in the codes of Alaska (Sec. 410, Comp. Laws of Alaska, 1913). Those sections are, therefore, Territorial statutes.

In addition to these Territorial statutes granting relief in habeas corpus proceedings, there is another and a different body of statutes in force in Alaska, having the same general purpose as the Alaska statutes, viz: the Chapter Thirteen of the United States Rev. Stat. 1878, being the general statutes of the United States on the subject of habeas corpus.

While the territorial statutes and the general United States statutes establishing the right to the writ of habeas corpus have the same general object in view, the two sets of laws are quite different in phraseology, in application, and in practice. The territorial statutes are broader in their application, are more specific and particular in their details, and contain "some special statutes authorizing" the writ not found in the general statutes of the United States, and, to that extent, it may be, some of the general statements found in the reported decisions of the Supreme Court of the United States do not apply with equal force to cases arising under the territorial laws.

The state constitutions and statutes establishing the right to the writ of habeas corpus differ from each other, and, adding those of the United States and Alaska, there are in the United States fifty such different statutes on the subject, no two of which, generally, are alike.

The federal courts having no common law juristion, derive their power in respect to the writ, from the Constitution of the United States, and the laws passed in pursuance thereof, while the power is inherent in the state courts of original jurisdiction by virtue of the common-law, preserved by the Constitutions of the states.

Bailey on Habeas Corpus, Vol 1, Sec. 1.

So far, then, as Alaska is concerned, the right to the remedy by habeas corpus is to be measured and controlled, in territorial cases, by the statutes of the territory. The judge in the lower court in this case felt bound by the hard and fast rule that the

prisoner should not be discharged except for the absolute want of jurisdiction in the justice's court, and based his holdings on the decisions of the Supreme Court of the United States, under the United States statutes in relation to judgments in superior courts.

In this case, however, it is the judgment and proceedings of a justice of the peace which are attacked, and which are thought to be illegal and void under the statutes of the Territory of Alaska, for, as the Supreme Court said in the Siebold case, there is "some special statute authorizing it."

Being a statutory remedy, then, the right and the remedy are as broad as the "special statute authorizing it." We think the "special statute authorizing it" in Alaska, is broader than the view taken by the trial judge in this case, but we also think the court should have discharged the prisoner under the more limited, even if general, rule, that the justice's court had no authority or power to order the imprisonment of the accused, because that court was wholly without jurisdiction to enter the judgment, and "for other matter rendering its proceedings void", as stated in the Siebold case, supra.

3. A Territorial Case.

We are informed by the heading on the complaint made in this case before the justice of the peace in the Sitka precinct, that it is a "Complaint for Violation of the Alaska Bone Dry Act,—Pub. No. 308", and by the opinion of the judge of the district court, that that means a violation of the Act of Congress entitled "An Act to prohibit the manufacture or sale of intoxicating liquors in the Territory of Alaska,

and for other purposes," approved Feb. 14 ,1917, 39 Stat. L. 903, is intended.

Now, this court held in the case of Abatte v. United States, 270 Fed. 735: "In brief, we think that the Bone Dry Law of Alaska remains in force, just as do the prohibition laws of the states, and the National Prohibition Act, although in force in all jurisdictions, effects no more the Alaskan act than it does the State acts." In short the court held the "Bone Dry Law" to be a Territorial statute, and, therefore, an application for a writ of habeas corpus to test the legality of a conviction under it will properly arise under the territorial statutes providing that remedy.

This case, then, in every part, arose and is to be tested and determined under the territorial statutes, and not under the United States statutes. It is a Territorial case to be tried on the Territorial side of the court, under Territorial statutes.

4. The Territorial Statutes in Habeas Corpus.

In his memorandum opinion in the case at bar the lower court based his conclusions wholly on the opinions of the Supreme Court of the United States, but those opinions were, in turn, based wholly on the United States statutes, and the general conclusions drawn from the Constitutional clause in Sec. 9, Art. 1.

Query: If in Alaska habeas corpus, like mandamus and other extraordinary writs, is purely a statutory remedy, will the court not determine the question in this case from the reading of the Alaskan statutes rather than from the general principles stated in the United States courts, based on the

United States statutes, or from the Supreme Court of any state in the Union, based on that state's statutes?

We have called particular attention to the statutes of Alaska, quoted in paragraph one above, for the purpose of pointing this court to the various clauses in those sections which accentuate the differences between the habeas corpus remedy in Alaska, and the United States statutes on the same subject, and also the quotations from the decisions of the Supreme Court, so freely made by the trial judge in his memorandum opinion.

We do not wish to be misunderstood: So far as the Territorial statutes are "some special statute authorizing it", we think they are the law of this case and should be followed, but, undoubtedly, the general principles announced by the higher appellate courts of this jurisdiction, in line with the Alaska statutes, and not in violation thereof, are to be followed, and in that regard we shall insist that the appellant is entitled to be discharged, on this record, on those general principles also.

Congress passed "An Act making further provision for a civil Government for Alaska, and for other purposes", on June 6, 1900, 31 Stat. L. 321. The provisions relating to habeas corpus will be found in that volume, in Chapter Fifty-Seven, at pages 423, being identical with Chapter 57 in the Compiled Laws of Alaska, 1913.

Under these statutes if it is shown the process is "illegal", the writ may be granted; the grounds for the discharge of one imprisoned "illegally" are specifically set out in Sec. 581, in Chapter 57, of the

act of Congress, in 31 Stat. L. 425, and in the identical statute in Sec. 1413, Compiled Laws of Alaska, 1913, page 540.

Under the statutory provisions in Chapter 57, in the Alaska code of civil procedure, and in the 31 Stat. L. 423, the writ of habeas corpus will lie in Alaska, and the prisoner be entitled to his discharge, when it shall appear to the court, on the return:

1. That the imprisonment is "illegal", Section 1398.
2. That he is not imprisoned under a "legal process", Section 1399.
3. That no "legal cause shown for imprisonment", Section 1411.
4. When the jurisdiction of such court officer has been exceeded, "either as to matter, place, sum, or person", Section 1413.
5. When "the party has become entitled to be discharged", Section 1413.
6. "When the order or process is defective in some matter of substance required by law, rendering such process void", Section 1413.
7. "When the order or process is not authorized by any judgment of any court, nor by any provision of law", Section 1413.
8. When the party has not "been legally committed for a criminal offense", Section 1415.
9. That "his imprisonment or restraint is unlawful, or that he is entitled to his discharge", Section 1419.
10. When the party detained is illegally imprisoned, Section 1422.

If any one or more of these ten statutory grounds

for discharge shall clearly appear on the face of the return, or the record in the case, it is the duty of the court to discharge the prisoner under the writ.

5. Criminal Jurisdiction of Justice Courts in Alaska.

The return and the record in this case show the appellant was imprisoned under an alleged order or judgment made by the Commissioner as ex-officio justice of the peace in the Sitka precinct, Alaska.

In enacting the penal code of March 3, 1899, for Alaska, Congress created the justice court with its limited jurisdiction as follows:

"Sec. 408. That in addition to the commissioners appointed by the President of the United States in pursuance of acts of Congress now in force, or that may be hereafter enacted, the judge of the district court of said district may appoint commissioners who shall reside at such places as he may designate in the order of appointment and who shall perform the duties and exercise the powers conferred upon justices of the peace by this act."

Sec. 408, 30 Stat. L. 1330.

Sec. 2517, Compiled Laws of Alaska, 1913.

All justices in Alaska are appointed under that section. The jurisdiction of a justice of the peace in criminal cases is established and limited by the following section:

"Sec. 410. That a justice's court has jurisdiction of the following crimes:

First. Laceny, where the punishment therefor may be imprisonment in the county jail or by fine.

Second. Assault, or assault and battery, not charged to have been committed with intent to com-

mit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties.

Third. Of any misdemeanor punishable by imprisonment in the county jail, or by fine, or by both."

Section 410, 30 Stat. L. 1330.

Section 2519 Compiled Laws of Alaska, 1913.

The justice's court in Alaska is one of limited and inferior jurisdiction.

6. Justice's Record Must Show Jurisdiction.

The record of a criminal court of limited jurisdiction must show affirmatively such facts as confer jurisdiction, and generally no presumption is indulged in favor thereof.

12 Cyc. page 228, and note 33.

Ex parte Kearney, 55, Cal. 212.

The mere exercise of jurisdiction by courts of inferior, limited, or special jurisdiction does not raise a presumption of the existence of the requisite jurisdictional facts, for nothing is presumed to be within the jurisdiction of such courts, except that which expressly appears to be so.

11 Cyc. page 693, and note 4.

John v. Marion Co. 4 Ore 46.

Farley v. Parker, 6 Ore 105; 25 Am. Rep. 504.

Northcut v. Lemery, 8 Ore 316.

Ferguson v. Jones, 17 Ore. 204; 20 Pac. 842; 11 Am. St. Rep. 808; 2 L. R. A. 620.

The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evi-

dence or proper averments in the record or their judgments will be deemed void on their face.

Galpin v. Page, 85 U. S. 350, 366; 21 L. Ed. 959, 963.

State v. Simpson, 91 Me. 81; 39 Atl. 287.

Northcut v. Lemery, 8 Ore. 316.

Courts martial are tribunals of special and limited jurisdiction, whose judgments, so far as questions relating to collateral attack are concerned, are always open to collateral attack, and unless facts essential to sustain their jurisdictioin appear, it must be held not to exist.

Collins v. McDonald, —— U. S. ——, Ad. Opinons No. 13, May 15, 1922, page 371.

McClaughry v. Deming, 186 U. S. 49, 62; 46 L. Ed. 1049-55.

Givens v. Zerbst, 255 U. S. 11, 19; 65 L. Ed. 475, 479.

Jurisdiction of inferior courts not of record must be affirmatively shown, and no presumption thereof exists. Freeman, Judgments, 3rd Ed. Sec. 517. They can, therefore, be attacked collaterally. While the writ of habeas corpus cannot be converted into a writ of error, yet, unless the court which tried the prisoner has jurisdiction to try and punish him for the offense, the prisoner may be discharged on such writ. Re. Coy, 127 U. S. 731, 737; 32 L. Ed. 274, 280; 8 Sup. Ct. Rep. 1263.

McClaughry v. Deming, supra.

In the 16 R. C. L. Sec. 41, page 363, Justices of the Peace, the rule is stated thus:

In criminal prosecutions as well as in civil actions a justice of the peace exercises a limited statutory

authority, and he cannot legally go beyond his authority, and if he does so his action will be null and void. Citing Lacey v. Hendricks, 164, Ala. 280; 51 So. 157; 137 Am. St. Rep. 45; Bregaglia v. Vineland, 53 N. J. L. 168; 20 Atl. 1082; 10 L. R. A. 407.

7. The Complaint in This Case.

The complaint upon which this case is based is as follows:

(Transcript, page 15.)

"IN THE UNITED STATES COMMISSIONER'S COURT FOR THE SITKA PRECINCT, DISTRICT OF ALASKA, FIRST DIVISION.

UNITED STATES OF AMERICA

vs.

HARRY MABRY, defendant.

Complaint for violation of the Alaska Bone Dry Act. Pub. No. 308.

Harry Mabry is accused by H. D. Stabler in this complaint of the crime of possessing intoxicating liquor, committed as follows, to-wit: The said Harry Mabry in the District of Alaska, and within the jurisdiction of this court, did wilfully and unlawfully, on the 1st day of December, 1921, at Sitka, Alaska, and in S. S. Thornton's residence near the Russian Greek Church at Sitka, Alaska, then and there have in his possession intoxicating liquor, to-wit, moonshine whiskey, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

H. D. Stabler,
Asst. U. S. Attorney.

United States of America)
Territory of Alaska) ss.

I, H. D. Stabler, being first duly sworn, depose and say that the foregoing complaint is true.

H. D. Stabler.

Subscribed and sworn to before me this 9th day of January, 1922.

(Seal) R. W. DeArmond.
Ex-Officio Justice of the Peace.

We make the following objections to this complaint:

1. That it is not the "information" required by Section 28 of the Act of Congress entitled "An Act to prohibit the manufacture or sale of intoxicating liquors in the Territory of Alaska, and for other purposes", approved Feb. 14, 1917, 39 Stat. L. 903, and did not give the justice of the peace in Sitka precinct any authority or jurisdiction to issue the warrant of arrest, or to try and render judgment in the case at bar.

2. That the said complaint does not substantially conform to the requirements of chapter seven of title fifteen, of the code of criminal procedure of Alaska, in this:

(a) It does not contain a statement of the facts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

(b) That it is not direct and certain as it regards the crime charged; nor,

(c) The particular circumstances of the crime

charged, being necessary to constitute a complete crime;

(d) That the act charged as the crime is not stated with such a degree of certainty as to enable the court to pronounce judgment, upon conviction, according to the right of the case;

(e) That the facts stated do not constitute a crime.

Chapter 42, code of criminal procedure, Compiled Laws of Alaska, 1913, "Criminal Actions in Justice's Courts," provides the practice in such courts. The first four sections in that chapter relate to the complaint in this case as follows:

"Section 2520. That a criminal action in a justice's court is commenced and proceeded in to final determination, and the judgment therein enforced, in the manner hereinbefore provided, except as in this chapter otherwise specially provided.

"Section 2521. That in a justice's court a criminal action is commenced by the filing of the complaint therein, verified by the oath of the person commencing the action, who is thereafter known as the private prosecutor; and no judgment of conviction or acquittal can be given in a criminal action in justice's court unless the person injured appear or be subpoenaed to attend the trial as a witness.

"Section 2522. That the complaint is to be deemed an indictment within the meaning of the provisions of chapter seven, title fifteen, of this act, prescribing what is sufficient to be stated in such pleading and the form of stating it.

"Section 2523. That upon the filing of the complaint the justice must issue a warrant of arrest for

the defendant named therein."

It was under those four sections of the code, and no other sections or law, that the complaint in this action was made and filed, and upon which this case was based in the justice's court in the Sitka precinct.

8. The Justice Has No Jurisdiction Except by "Information".

But, Sec. 28 of the act of Congress of Feb. 14, 1917, called the "Alaska Bone Dry Law", by the district judge in his "memorandum opinion", provides a special method of beginning criminal actions for its enforcement by "information".

That section provides as follows:

"Sec. 28. That prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska, and said United States district attorney or his deputy shall file such information upon the presentation to him or his assistants of sworn information that the law has been violated; and in such prosecutions any one making a false oath to any material fact shall be deemed guilty of perjury."

And, also, prosecutions for violations of the liquor license provisions of the act of Congress approved June 6, 1900, are found in Chapter 44 of the Alaska code of criminal procedure, Compiled Laws of Alaska, 1913, could only be commenced by "information filed in the district court or any subdivision thereof, or before a United States Commissioner, by the United States marshal or any deputy marshal, or

by the district attorney or by any of his assistants. Or such prosecution may be by and through indictment by grand jury, and it shall be the duty of either of said officers, on the representation of two or more reputable citizens, to file such information, or to present the facts alleged to constitute violations of the law to the Grand Jury."

Sec. 274 Carter's Codes, 1900.

Sec. 2583, Compiled Laws of Alaska, 1913.

In short, Congress has provided for two methods of commencing criminal prosecutions before a justice of the peace in Alaska, and two only, viz:

1. Violations of the liquor laws of 1900, and also of 1917, shall be by "information" filed by a specified public official, either before a justice or a district court.

2. All other criminal prosecutions before a justice of the peace shall be commenced by complaint, under section 2521, supra, by a "private prosecutor", or by an official acting as such.

Assuming, as the judge of the district court did, that the prosecution before the justice of the peace at Sitka was commenced for a violation of the act of Feb. 14, 1917, for having intoxicating liquor in possession by the appellant, it could be lawfully commenced, under Sec. 28 of that Act, supra, only by "information filed by any such officer before a justice of the peace", and not by complaint.

Webster defines "complaint" as an accusation or charge against an offender, made by a private person or an informer to the justice of the peace or other proper officer, alleging that the offender has violated the law, and claiming the penalty due to

the prosecutor. It differs from "information", which is a prosecution of the offender by an attorney or solicitor; from a "presentment" or "indictment", which are accusations of the Grand Jury.

Goddard v. State, 12 Conn. 448, 453.

Even more clearly in Alaska, a "complaint" under section 2521 is the pleading to be used by a "private prosecutor", while under Sec. 28 of the act of Feb. 14, 1917, in prosecutions for violation of the Territorial prohibition law, the prosecution can only be commenced by a public officer, and only by information.

In this case the prosecution was commenced by the "complaint" set out in the record, and since it is jurisdictional, and illegal and in violation of the strict letter of the law, the justice had no jurisdiction under the Alaska Prohibition Act, called the "Alaska Bone Dry Law", under the complaint.

But the district judge in his memorandum opinion, says there is no difference in the necessary charging part of a "complaint" and an "information", and while the private prosecutor in this case called it a "complaint" and the justice called it a "complaint", and section 2521 fixes its legal character as a "complaint", he, the judge, calls it an "information".

And equally it is true there is not, under section 2522, supra, any difference in the charging parts of a "complaint" and an "indictment" for that section says:

"Sec. 2522. That the complaint is to be deemed an indictment within the meaning of the provisions of chapter seven, title fifteen, of this act, prescribing

what is sufficient to be stated in such pleading and the form of stating it."

But would the court hold that a "complaint" is an "indictment" or vice versa, for that reason?

We think too, the judge of the district court had no right or authority thus to mutilate and misstate the record. There was no evidence offered before him or elsewhere to show any error or mistake of the justice in the character of the pleading. In his order for the summoning the jury the justice declared:

"Whereas there has been a complaint duly sworn to filed in the above entitled court, and the above named defendant having," etc.

(Transcript, page 17)

and in the docket entries he repeated it:

"Complaint made by H. D. Stabler, Asst U. S. Attorney," etc. * * * * *

1922.

Jan. 9, Complaint sworn to and filed," etc.

(Transcript, page 25)

We submit it is perfectly clear on the face of the record that there was no misunderstanding or mistake in regard to the character of the pleading upon which the criminal prosecution was begun before the justice, and the judge of the district court is not justified in declaring it to be an information, for the person signing it and the justice both meant it to be a complaint as it was in law and in fact.

9. The Complaint Did Not State Facts Sufficient to Constitute a Crime.

In an application for habeas corpus by one sen-

tenced by a justice or municipal court, a complaint, or information is examined as critically as upon demurrer, since the legality of the proceedings in such court is not presumed but must be made affirmatively to appear by the record.

Ex parte Goldsworthy (Cal) 134 Pac. 352.

Ex parte Grenall, 153 Cal 767, 770; 96 Pac. 804.

Ex parte Kearney, 55 Cal. 212.

In re Morganstern, 104 Pac. 448.

Ex parte Tobias Watkins, 3 Pet. 193; 7 L. Ed. 650.

Ex parte Bain, 121, U. S. 14; 30 L. E. 849, 853.

Assuming, as the district judge did, that the charge against the appellant was for a violation of the first section of the Alaska Prohibition Act of Feb. 14, 1917, 39 Stat. L. 903, for having in his possession intoxicating liquor by taking a drink of "moonshine whiskey" in his neighbor's house, that section reads:

"Be it enacted, etc., That on and after the first day of January, 1918, it shall be unlawful for any person * * * to have in his * * * possession * * * any intoxicating liquor * * * unless the same was procured and is so possessed * * * as hereinafter provided."

And Section 14 of that Act repeats as follows:

"Sec. 14. That it shall be unlawful for any person to * * * have in his possession any intoxicating liquors, except as in this Act provided."

The crime defined and denounced in the enacting clause,—the first section of the act, contains two necessary elements or ingredients: First. Having "in his possession any intoxicating liquor"; Second.

Not "so procured and * * * possessed * * * as hereinafter provided".

The crime defined and denounced in the 14th section of the act, also contains the same two necessary elements or ingredients. First. Having in his possession intoxicating liquor. Second. "except as in this act provided".

There is no other definition of this crime in this Act.

Section 2150, Chapter seven, of the Code of Crim. Pro., Comp. Laws of Alaska, 1913, provides:

"Sec. 2150. That the indictment must be direct and certain as it regards:

First. The party charged;

Second. The crime charged; and

Third. The particular circumstances of the crime charged, when they are necessary to constitute a complete crime."

And Section 2522, Chapter forty-two, Code of Crim. Pro., Comp. Laws of Alaska, 1913, makes this section applicable to this complaint:

"Sec. 2522. That the complaint is to be deemed an indictment within the meaning of the provisions of chapter seven, title fifteen, of this act, prescribing what is sufficient to be stated in such pleading and the form of stating it."

The crime charged in the complaint alleges, merely, in words of the statute, that the defendant did "then and there have in his possession intoxicating liquor, to-wit, moonshine whiskey." Obviously this allegation does not charge a crime, direct and certain as it regards; "second. The crime charged; and, Third. The particular circumstances of the

crime charged when they are necessary to constitute a complete crime."

Sec. 2 to 13 (both inclusive) of the act provide for the legal possession of intoxicating liquor in Alaska, and, since these sections are still in force and effect there (Abbate v. U. S., 270 Fed. 735), there are no "particular circumstances of the crime charged when they are necessary to constitute a complete crime" in this complaint. The second necessary element or ingredient of the crime (possession in violation of sections 2 to 13) is not charged in any apt words in the complaint. Hence there is no crime charged therein.

State v. Emmons, 104 Pac. 882; 55 Ore. 352.
State v. Townsend, (Ore.) 118 Pac. 1020.
State v. Kennedy, (Ore.) 118 Pac. 1023.
Sedgwick, Stat. & Const. Law 115.
State v. Mallory, 34 N. J. Law. 410-413.
State v. Freeman, 6 Blackf. (Ind) 248.

The "complaint", then, upon which jurisdiction in this case is based, does not state facts sufficient to constitute a crime, either in a complaint, or information, or an indictment, under that statute, because it does not negative the exception stated in the definition of the crime in the enacting clause and in section 14 of the act of Congress.

The rule in the United States courts is thus stated by the Supreme Court in the case of United States v. Cook, 84 U. S. 168; 21 L. Ed. 538:

"Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense can-

not be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused. Steel v. Smith, 1 Barn. & Ald. 99; Arch. Cr. Pl. 15th Ed. 54.

* * * *

With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error. Arch. Cr. Pl. Cases, 15th Ed. 54.

Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is, nevertheless, clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause,

section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation and would also be defective for the want of clearness and certainty. State v. Abbey, 29 Vt. 66; 1. Bish. Crim. Proc. 2nd Ed. Sec. 639, N. 3.

* * * *

Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or private contract, that unless the exception in the general clause is negatived in pleading the clause, no offense, or no cause of action will appear in the indictment or declaration when compared with the statute or contract."

United States v. Cook, 84 U. S. 168; 21 L. Ed. 538.

The following cases in the ninth circuit cite the rule with approval:

United States v. Nelson, 29 Fed. 202, 209.
United States v. Nelson, 30 Fed. 112, 115.
Shelp v. United States, 81 Fed. 694.
Hockett v. United States, 265 Fed. 588.
Davis et al, v. United States, 274 Fed. 928.

The rule is also cited in the following cases, where the indictments are held to be bad, for failing to negative the exception:

Evans v. United States, 153 U. S. 584; 38 L. Ed. 830.

Ledbetter v. United States, 170 U. S. 606; 42 L. Ed. 1162.

Maxwell etc. Co. v. Dawson, 157 U. S. 604; 38 L. Ed. 285.

United States v. Felderward, 36 Fed. 490.
People v. Fairbanks, 7. Utah 5; 24 Pac. 538.
Young v. Territory, 8 Okla. 528; 58 Pac. 724.
Territory v. Scott, 2 Dak. 212; 6. N. W. 435.
State v. Abbey, 29 Vt. 60.
Rice v. State (Tex. Cr. App.) 38. S. W. 802.
Mays v. State, 89 Ala. 39; 8. So. 29.
State v. Duke, 42 Tex. 459.

Every ingredient of which the offense is composed must be clearly and accurately alleged in the indictment:

United States v. Cruikshank, 92 U. S. 558; 23 L. Ed. 593.

United States v. Mann, 95 U. S. 584; 24 L. Ed. 532.

Moore v. United States, 160 U. S. 270; 40 L. Ed. 424.

State v. Scheminisky, (Idaho) 174 Pac. 611.
State v. Cole, (Idaho) 174 Pac. 131.

The rule in United States v. Cook, supra, has been applied by the courts of this circuit to the prohibition clause in Section 14, Act May 17, 1884, 23 Stat. L. 24, in:

United States v. Nelson, 29 Fed. 202, 209.
United States v. Nelson, 30 Fed. 112, 116.
Shelp v. United States, 81 Fed. 694.

and to the National Prohibition Act, in the 8th Circuit in:

Massey v. United States, 281. Fed. 294.

and in those cases the court held the exceptions under these acts need not be negatived, under the second clause in the general rule.

So far as counsel is advised, however, no ruling

on this point has been made by the Circuit Court of Appeals, Ninth Circuit, in its relation to the Alaska Prohibition Act of Feb. 14, 1917, 39 Stat. L. 903.

Upon a careful examination of the foregoing authorities and the application of the general rule to the definition of the crime charged in the enacting clause in the Act and in the "complaint" herein, we submit there cannot be a sufficient statement of facts in a complaint or indictment by the mere use of the words of the statute, that the accused did "then and there have in his possession intoxicating liquor to-wit, moonshine whiskey" to constitute a crime, without negativing the exception directly or by other apt words "to show that the accused is not within the exception" made in the statute.

That being conceded, or established by the law, it follows "that the facts stated do not constitute a crime", (Sec. 2199 Comp. L. Alaska, 1913,) and that the "complaint" did not (for that reason) give the justice of the peace jurisdiction to render judgment of conviction, and all proceedings under such complaint are null and void.

10. The "Complaint" Not Good as an "Information."

The case of Booth v. United States, 197 Fed. 283, 285, contains an approved form of information generally used in Alaska liquor cases, though not perfectly adopted to the present Alaska Prohibition Act of Feb. 14, 1917, 39 Stat. L. 903. It is a formal official information, by and in the name of the assistant United States Attorney, verified by him as such official, and in which he declares his official position and authority under oath.

Now in the complaint at bar there is no attempt to comply with these formal legal requisites. The complaint is signed by H. D. Stabler, and below his name are the words "Asst. U. S. Attorney", but no verification, or other record evidence follows to show that he is such an official, and we are left to guess whether the private prosecutor who signs his name to the complaint is an official mentioned in Sec's. 27 and 28 of the Alaska Prohibition Act, Feb. 14, 1917, or not. In view of the jurisdictional clause in Sec. 28, supra, "that prosecutions for violations of the provisions of this Act shall be on information filed by any such officer", and that no other person has jurisdiction or authority to begin such a prosecution by information, we think the complaint is bad as an information for the want of such proof.

We submit that the rule in respect to inferior courts admits nothing—presumes nothing not on the face of the record; that the record must show every jurisdictional fact, and that such a complaint, so signed by a private prosecutor fails to establish jurisdiction and is void.

11. A Void Warrant of Arrest.

Upon filing the complaint with the justice of the peace in the Sitka precinct, and on January 9th, 1922, the justice issued a warrant for the arrest of the accused.

(Transcript, page 16)

Under Chap 42, Code of Criminal Proc. Comp. Laws of Alaska, 1913, it is provided that:

"Sec. 2523. That upon the filing of the complaint the justice must issue a warrant of arrest for the defendant named therein."

"Sec. 2524. That a warrant of arrest in a criminal action is issued, directed, and executed in all respects as the warrant provided for in chapter thirty-two, title fifteen, of this act except that it must be made returnable only before the justice who issues it."

Chapter 32, title 15, Code of Crim. Pro. Comp. Laws of Alaska, 1913, provides the form of the warrant of arrest as follows:

"Section 2384. That a warrant of arrest is an order in writing, in the name of the United States, signed by a magistrate with his name of office, commanding the arrest of the defendant, and may be substantially in the following form: "District of Alaska, Division No. ——. In the name of the United States of America.

"To the United States Marshal of the District of Alaska or any deputy, greeting: "Information upon oath having been this day laid before me that the crime of (designating it) has been committed, and accusing C. D. thereof: You are, therefore, hereby commanded forthwith to arrest the above named C. D. and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate.

"Dated at ———, this —— day of ————, —— hundred and ——.

"E. F.

"Commissioner, Ex-Officio Justice of the Peace."

"Sec. 2385. That the warrant must specify the name of the defendant or if it be unknown to the magistrate the defendant may be designated by a

fictitious name, with a statement therein that his true name is unknown, and it must also state a crime in respect of which the magistrate has authority to issue the warrant."

The warrant for the arrest of the appellant followed the form prescribed in section 2384, in all respects except the peremptory jurisdictional command in the last clause of Sec. 2385, that "it must also state a crime in respect to which the magistrate has authority to issue the warrant."

The warrant stated the crime as follows:

"Information upon oath having been this day laid before me that the crime of violating the Alaska Bone Dry Act, Pub. No. 308, has been committed, and accusing Harry Mabry thereof. You are, therefore, hereby commanded forthwith to arrest," etc.

(Transcript, page 16,)

Of course, that does not "state a crime in respect to which the magistrate has authority to issue a warrant", or at all. Assuming, as the judge below did without evidence to support it, that the reference is to the Act of Congress of Feb. 14, 1917, 39 Stat. L. 903, still there are many crimes defined in that act, one of which is the crime of perjury, in Sec. 28, and there is nothing in this warrant to point out any special or any "crime in respect to which the magistrate has authority" as commanded in the sections above quoted. The warrant of arrest being in plain violation of the statute was void.

"The charge of the trial judge with respect to the foregoing order or process was, in effect that it was void upon its face, that it gave the sheriff no

authority for the arrest and confinement complained of, and could therefore afford him no protection in this action. The order in question was utterly void upon its face, * * * The action of the sheriff in arresting the plaintiff under void process must be regarded in the same light as if he had arrested him without any process at all. He acted entirely without any authority of law, and was therefore a trespassor."

McLendon v. State (Tenn) 21 L. R. A. 738.

John Bad Elk v. U. S. 177 U. S. 529; 44 L. Ed. 874.

12. A Void Verdict By the Jury.

The verdict of the jury was in the following words:

"We, the undersigned jurors in the above named matter, being first duly subpoenaed and empanelled, and after hearing the evidence presented and giving sincere consideration to the same, find the defendant guilty."

(Transcript, page 20.)

Chap. 42, Code of Crim. Pro. Comp. Laws, Alaska, 1913, under "Criminal Actions in Justice's Courts," provides:

"Sec. 2534. That when the jury have agreed upon a verdict they must deliver the same to the justice publicly, who shall enter it in his docket."

"Sec. 2535. That when the defendant pleads guilty, or is convicted, either by the justice or the jury, the justice must give judgment thereon for such punishment as may be prescribed by law for the crime."

Now, section 2534, above, makes it the duty of the justice who receives the verdict to "enter it in his docket". Since there is no presumption in favor of the verdict in the justice court we must find it in his docket, or it does not exist. It was not entered "in his docket" as will clearly appear from the certified copy of "his docket" at page 28 of the Transcript. The only reference to the verdict "in his docket" reads:

"After deliberation the jury returned a verdict of guilty."

(Transcript, page 28.)

The docket also shows a further lack of jurisdiction in its failure any where to state facts from which this court can infer or presume it to "state a crime in respect to which the magistrate has authority to issue the warrant", or to support the verdict so rendered by the jury.

(Transcript, pages 25-29.)

Beginning at page 25, Transcript, the docket reads:

"Complaint made by H. D. Stabler, Ass't U. S. Attorney.

Offense charged Viol. Alaska Bone Dry Act, Pub. No. 308.

Offense committed at Sitka, on Dec. 1, 1921.

Place of arrest, Sitka," etc.

* * * *

After deliberation the jury returned a verdict of "guilty".

But no where in his docket does the justice "state a crime in respect of which the magistrate has authority to issue the warrant", nor does he any where

comply with section 2534 in respect to the verdict to "enter it in his docket".

The verdict is void for uncertainty and because the justice did not enter it in his docket.

"On the trial of two defendants for larceny, a verdict which reads, 'We, the jury, empanelled to try the above case, find the defendant guilty as charged in the indictment', is void for uncertainty. Such a verdict cannot be amended on the affidavits of the jurors, showing that they intended to convict both defendants. Richards v. Sperry, 7 Wis. 219. Judgment reversed and new trial ordered. Com. v. Call, 21 Pick. 514: Stuart's case, 28 Grat. 967; Hogan v. State, 30 Wis. 428."

State v. Weeks, 23 Ore. 3; 34 Pac. 1095.

People v. Supelveda, 59 Cal. 342.

"When a jury brings in a defective and void verdict, it is in the power of the prisoner or prisoners, as well as that of the people or prosecutor, at the time of its rendition, in the presence of the jury, to have it set right. If the prisoner or prisoners, in such case, choose not to interfere, and suffer a defective verdict to be entered by failing to interpose, objection is thereby waived to being put a second time in jeopardy for the same offense. In such cases the verdict is simply set aside as a nullity and a new trial is ordered. The court cannot make the verdict what it should be. See 1. Bish. Crim, Pro. Sec. 842; 1 Bish. Crim. Law Secs. 844-850. But the general effect of an uncertain verdict is fatal to it. See 1 Arch. Crim. Prac. 666, note a; also 3. Gran. & W. New Trials, 1378, and the cases therein cited."

Brannigan v. People, 3 Utah. 488; 24 Pac. 767.

"A good verdict must contain, either in itself or by reference to the indictment, all the elements of the crime. If silent on some element of the crime, the verdict will not sustain a judgment. 1. Bish. New Cr. Proc. Sec. 1005. It is quite apparent that this verdict, standing alone and without reference to the indictment, is not sufficient. The defendant is found "guilty of defrauding C. Schnelle" of a promissory note. There is no such crime known to the law. * * * But there is no reference in the verdict to the indictment as an aid to determine by what means the fraud was consummated and unless it was consummated as charged in the indictment not only was the verdict insufficient, but the defendant could not be found guilty at all."

People v. Cummins, 117 Cal. 497; 49 Pac. 576.

"A judgment of conviction will be reversed unless the verdict finds the defendant guilty of the offense charged in the indictment, or some offense included in the offense so charged."

The People v. Ah Gow, 53 Cal. 627.
Kimball v. Territory, 13 Ariz. 310; 115 Pac. 70.
State v. Stephanus, 53 Ore. 135; 99 Pac. 428.

The verdict is void for uncertainty, (1) because it does not state the crime with which the accused is found guilty. (2) Because it does not refer to the charge in the complaint, or any other part of the record for certainty. (3) Because the carge in the complaint lacks one necessary element of crime which is not negatived in the complaint or otherwise ,and (4) because it is not entered in the justice's docket as required by Sec. 2534.

13. A Void Judgment.

There is a "sentence" but no "judgment" in this case. Chap 42 of the code of Crim. Pro. Comp. Laws of Alaska, 1913, relates to criminal actions in justice's courts, and Sec. 2539-40 and 41 therein authorizes the justice to enter judgment in criminal cases before him and fixes the form and contents thereof. Being a statutory power it must be exercised in strict compliance with the statute or it is void. These sections are as follows:

"Sec. 2539. That when a judgment of conviction is given, either upon a plea of guilty or upon a trial, the justice must enter the same in the docket substantially as follows: 'Justice's court for the precinct of ————, District of Alaska, Division No. ——, The United States of America v. A. B. (Day of the month and year.) The above named A. B. having been brought before me, C. D., a commissioner and ex-officio justice of the peace, in a criminal action, for the crime of (briefly designate the crime), and the said A. B. having thereupon pleaded "not guilty" (or as the case may be), and been duly tried by me (or a jury as the case may be), and upon such trial duly convicted, I have adjudged that he be imprisoned in the county jail ——— days and that he pay the costs of the action, taxed at ——— dollars (or that he pay of (a) fine of ———— dollars and such costs and be imprisoned in such jail until such fine and costs be paid, not exceeding ——— days, as the case may be). C. D., Commissioner and ex-officio justice of the peace.

"If the defendant has pleaded guilty, instead of

the paragraph commencing "and the said A. B.", and ending "upon such trial duly convicted", the entry must state substantially as follows: "And the said A. B. having been thereof duly convicted upon a plea of guilty."

"Sec. 2540. That an entry of judgment and the transcript thereof, made or filed as in the last two sections provided, is conclusive evidence of the facts stated therein."

"Sec. 2541. That the judgment must be executed by the United States marshal or any deputy, upon receiving a certified copy of the entry of judgment, and such copy shall also be deemed an execution against the property of the defendant for the purpose of collecting the amount of any fine or costs mentioned therein."

The certified copy of the justice's docket in this case will be found at pages 25-29, Transcript. At page 25 the docket shows:

"Docket Entries

"Complaint made by H. D. Stabler, Asst. U. S. Attorney.

Offense charged Viol. Alaska Bone Dry Act. Pub. 308.

Offense committed at Sitka on Dec. 1, 1921.

Place of arrest—Sitka.

Disposition of case—defendant tried by jury, convicted and sentenced.

Jany. 9, 1922. Complaint sworn to and filed by H. D. Stabler, assistant United States Attorney charging Harry Mabry with Violating the Alaska Bone Dry Act. Pub. 308."

* * * *

(Page 28) "After deliberation the jury returned a verdict of guilty.

"In view of the evidence and the jury verdict, I have adjudged that Harry Mabry be imprisoned in jail for a period of four months and that he pay the costs of the action taxed at Ninety three and 55-100 dollars ,and that he pay a fine of Six hundred dollars and be imprisoned in jail until such fine and costs be paid, not to exceed three hundred days.

"R. W. DeArmond, United States Commissioner, Ex-Officio Justice of the Peace, Sitka Precinct, Alaska."

That is the only judgment in this case,—the paper on page 21 of the Transcript is what the justice says upon its face is a true copy of the original entry of judgment, and is the warrant of commitment in this case, and not the judgment.

In addition, however, to this "judgment" in the docket there is another entered by the judge of the district court on his dismissal of the attempted appeal of the prisoner from the justice's court to the district court.

(Transcript, pages 38 and 45.)

In that dismissal the district judge ordered: "And it is further ordered and adjudged that the judgment heretofore had in said cause in the United States Commissioner's court for Sitka Precinct, on the 9th day of January, 1922, to-wit, that the defendant serve three months' confinement in the jail at Juneau, Alaska, and to pay a fine of $600.00 and the costs of the action be and the same hereby is affirmed."

(Transcript, pages 39 and 45.)

Notice the district judge's affirmance fixed the term of appellant's imprisonment at "three" months instead of four months ,to be served in the jail at "Juneau, Alaska," instead of Sitka, and also he affirmed the imprisonment for non-payment of the costs. This order of affirmance was assumed to be made under the provisions of Sec. 2559 Compiled Laws of Alaska, 1913, on the dismissal of the attempt of the defendant to appeal his case, and not upon any original jurisdiction or trial of any kind before the district court.

Bailey on Habeas Corpus, Vol. 1, page 751.

Where the lower court had no jurisdiction the appellate court will have none on appeal.

Chaves v. Pena, 2 Pac. 73; 3 N. M. 89.
Chadwick v. Chadwick, 13 Pac. 385; 6 Mont. 566.
Armour Co. v. Howe, 64 Pac. 42; 62 Kan. 587.
In re Searles, 127 Pac. 902; 46 Mont. 322.
Evans v. Oregon Short Line, 149 Pac. 715.
Bank v. Courtwright, 158 Pac. 277; 82 Or. 490.
Tracy v. Sumida, 161 Pac. 503; 31 Cal. App. 716.
Burt & Co. v. Marks, (Utah), 177 Pac. 224.
Valencia Co. v. Neilson, (N. M.) 192 Pac. 510.

Under the statutes of Alaska, Secs. 2539, 2540 and 2541, last above quoted ,the judgment in this case was and is void (1) because it was not entered in the docket substantially as required by the explicit requirements of Sec. 2539, or at all, and (2) because it did not state any crime upon which the defendant was convicted, as also specifically required by Sec. 2539, (3) because it does not state when the alleged crime was committed, (4) nor the place where it was committed,—whether within the

jurisdiction of the justice court or not, (5) nor in what jail he is to be confined, (6) nor does it show whether it was a crime within the jurisdiction of the justice, a misdemeanor or not.

1. It is too clear for argument that the mere entry of the sentence in the justice's docket at page 28 of the Transcript is not even an attempt to comply with the particular command of the statute in Sec. 2539, supra: "That when a judgment of conviction is given * * * the justice must enter the same in the docket substantially as follows." Since no such judgment was entered in his docket, the justice lost jurisdiction at that point, even if he ever had such jurisdiction.

2. The mere statement elsewhere than in his docket, or even in his docket, that the defendant was brought before him "in a criminal action for the crime of violating the Alaska Bone Dry Act," without any other statement of "the crime" renders the judgment void for uncertainty and for noncompliance with the law and the form as provided for such cases.

Assuming as the lower court did in his "memorandum opinion", that the defendant was accused of some violation of the Alaska Prohibition Act of Feb. 14, 1917, 39 Stat. L. 903, this judgment is void because it did adjudge him convicted of one of the many crime denounced therein ,among which is perjury (Sec. 28), over which the justice had no jurisdiction in any event.

3. Since neither the verdict nor the judgment refers to the "complaint" in this case for the particulars of the crime charged, there is no time fixed

in the judgment when it occurred,—it may be barred by the statute of limitations.

4. The "judgment" in the docket, page 28, Transcript, does not fix the place of confinement,—just "in jail", and it is void for that reason.

5. Nor does the verdict nor the judgment, by reference to the complaint, nor in any other way, disclose whether the alleged crime of the violation of the "Alaska Bone Dry Law" occurred within the Sitka precinct, or the First Division, or even in Alaska.

6. And, finally by failure in the verdict and in the alleged judgment to specifically declare the crime of which the defendant was guilty, this court cannot now say what the crime was, nor whether it was within the jurisdiction of the justice, nor which one of the many crimes (including the perjury of Sec. 28) denounced in the Act it may have been. The judgment is clearly void for uncertainty, and for failure to enter it in compliance with the statute.

"It is undoubtedly the general rule that a judgment rendered by a court in a criminal case, must conform strictly to the statute, and that any variations from its provisions, either in the character or extent of the punishment inflicted, renders the judgment void.

Graham v. Weeks, 138, U. S. 461; 34 L. Ed. 1051.

In the case of Mackey, et al. v. Miller, 126 Fed. 161, the United States Circuit Court of Appeals, Ninth Circuit, said:

"The appellants contend that the judgment of the district court is void for the reason that the in-

dictment charges no offense against any law of the United States,"—and on page 163, the court held:

"Question is made of the power of this court upon habeas corpus to discharge the appellants upon the facts set forth in the record, and it is said that the writ of habeas corpus cannot be used to perform the function of a writ of error. But the doctrine is well established that upon a writ of habeas corpus, if it appear that the court which rendered the judgment had not jurisdiction to render it, either because the proceedings under which they were taken were unconstitutional or for any other reason, the judgment is void, and may be questioned collaterally, and the person who is imprisoned thereunder may be discharged from custody on habeas corpus. Ex parte Neilsen, 131 U. S. 176, 182; 9 Sup. Ct. 672; 33 L. Ed. 118; Ex parte Lange, 18 Wall, 163; 21 L. Ed. 872; Ex parte Siebold, 100, U. S. 371; 25 L. Ed. 717. If it be true that the acts committed by the appellants, which are set forth in the indictment in this case, are not within the intendment of Sec. 5447 of the Revised Statutes (11 Comp. St. 1901, p. 3678), they do not constitute an offense against that statute, or against any other statute of the United States. Such being the case, it appears affirmatively from the return that the appellants are held in custody under a judgment which upon its face is void. * * * The decision of the case turns upon the question whether the appellants are imprisoned unlawfully, for the reason that the judgment is void."

Mackey v. Miller, 126 Fed. 161, 163.

A somewhat similar judgment was considered by the Supreme Court of the United States in the case

of Pointer v. United States, 151, U. S. 396, 418; 38 L. Ed. 209, 217, where that court said:

"The specific objection to the sentence is that it does not state the offense on which the defendant was found guilty, or that the defendant was guilty of any named crime. * * * While the record of a criminal case must state what will affirmatively show the offense, the steps, without which the sentence cannot be good, and the sentence itself, "all parts of the record are to be interpreted together, effect being given to all, if possible, and a deficiency at one place may be supplied by what appears in another", 1. Bishop Crim. Proc. Secs. 1347-1348. For these reasons the objection last stated is not sustained."

Pointer v. United States, supra.

The following cases are identical with the case of Pointer v. U. S. supra, and cite it as an authority:

Sandy White v. United States, 164 U. S. 100; 41 L. Ed. 365.

Ex parte Thurston, 233 Fed. 847.

The case at bar is the exception which proves the rule in the Pointer case. In this case the record of the justice's court shows only an insufficient charge, and neither the warrant of arrest, nor the order for the jury, nor the subpoena, nor the verdict, nor the judgment, nor any other part of the record, shows the name or the nature of the crime of which the defendant was convicted.

Then, too, the rule that a deficiency in the record may be supplied from other parts thereof applies only to superior courts of record and not to such inferior courts as justices of the peace:

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. * * * Without straining either the constitution of the United States, or the well settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority and he should,therefore, be discharged."

Ex parte Lange, 85 U. S. 163; 21 L. Ed. 872.

"The judgment of the court must in all cases be based upon the verdict of the jury, and the verdict of the jury must be responsive to the issue joined by the indictment or information and the plea of the person on trial thereto, otherwise, the court is without jurisdiction to render judgment thereon. * * * In a late work on Jurisdiction the author, in discussing the three essential elements necessary to render a conviction valid, says: "These are that the court must have jurisdiction over the subject matter, the person of the defendant, and authority to render the particular judgment. If either of these elements are lacking, the judgment is totally defective," Brown on Jurisdiction, par. 110."

Ex parte Harris —— Okla——; 128 Pac. 156.

14. A Void Commitment.

A copy of a legal judgment of a justice of the peace in a criminal case within his jurisdiction, properly certified and delivered to the marshal, is made a sufficient warrant of commitment in Alaska.

"Section 2541. That the judgment must be executed by the United States marshal or any deputy, upon receiving a certified copy of the entry of judgment and such copy shall also be deemed an execution against the property of the defendant for the purpose of collecting the amount of any fine or costs mentioned therein."

The following is the only warrant of commitment shown on the face of the record or return in this case:

(Caption and Title.)

"Violation of Alaska Bone Dry Law, or Pub. No. 308.

"JUDGMENT.

"On the 9th day of January, 1922, the above named Harry Mabry having been brought before me, R. W. DeArmond, a U. S. Commissioner and Ex-Officio Justice of the Peace at Sitka, Alaska, in a criminal action for the crime of violating the Alaska Bone Dry Law and the said Harry Mabry having pleaded not guilty and been duly tried by jury trial and upon such trial Harry Mabry having been duly convicted, I have adjudged that he be imprisoned in the jail at Sitka for four months and that he pay the costs of the action taxed at Ninety three and 55-100 dollars, and that he pay a fine of Six hundred Dollars, and be imprisoned in such jail until such fine and costs be paid, not exceeding Three hundred days.

"A TRUE COPY OF THE ORIGINAL ENTRY OF JUDGMENT

"In witness whereof I have set my hand at Sitka, Alaska, this 9th day of January, 1922.

(Seal) R. W. DeArmond,
U. S. Commissioner and ex-officio Justice of the Peace.

(Endorsed)
United States of America)
District of Alaska) ss.

"I certify that I received the within commitment on the 9th day of January, 1922, and executed the same on the 9th day of January, 1922, by delivering the within named defendant to the jailer of the U. S. Jail at Sitka, Alaska.

Geo. D. Beaumont,
U. S. Marshal, by S. G. Thomas, Deputy U. S. Marshal."

(Transcript, pages 21-22.)

One of the first habeas corpus decisions written by Chief Justice Marshall is that in the case of Ex parte Burford, 3 Cranch. 448; 2 L. Ed. 495., in which habeas corpus was brought to test the legality of imprisonement under commitment from a justice of the peace:

"In the present case, the marshal's return, so far as it stated the warrant upon which Burford was arrested and carried before the justices, was perfectly immaterial. He did not complain of that arrest, but of his commitment to prison. The question is, what authority has the jailer to detain him? To ascertain this we must look to the warrant of commitment only. It is that only which can justify his

detention. That warrant states no offense. It does not allege that he was convicted of any crime. It states merely that he had been brought before a meeting of many justices, who had required him to find sureties for his good behavior. It does not charge him of their own knowledge, or suspicion, or upon oath of any person whomsoever. HELD. A warrant of commitment by justices of the peace must state a good cause certain, supported by oath."

Ex parte Burford, 3 Cranch 448; 2 L. Ed. 495.

United States v. Martin, 17 Fed. 156.

United States v. Tureaud, 20 Fed. 621.

Erwin v. United States, 37 Fed. 470.

"The mittimus must be in writing, under the hand and seal of the magistrate issuing it, showing his authority. It must be properly directed, and must set forth the crime alleged against the party with convenient certainty, and ought to have a lawful conclusion."

Sanders v. United States, 73 Fed. 782, 785.

A warrant of commitment which does not state the offense for which the prisoner is convicted, is void.

In re Ring, 28 Cal. 253.

Ex parte Dobson, 31 Cal. 497.

Ex parte Gibson, 31 Cal. 621.

Ex parte Dela, 25 Nev. 346; 60 Pac. 217.

A commitment is a warrant, order, or process by which a court or magistrate directs a ministerial officer to take a person to prison or to detain him there. From the earliest times, as appears from the reported cases on the subject, this process was required to contain a statement of the nature of the

crime with which the prisoner was charged. The legal requisites of such a process are thus described by an acknowledged authority on the subject of crimes and criminal procedure as defined by the common law: "It must be in writing, under the hand and seal of the person by whom it is made, and expressing his office or authority ,and the time and place at which it is made, and must be directed to the jailer or keeper of the prison. It may be made either in the name of the King, and only tested by the person who makes it, or may be made by such person in his own name. It may command the jailer to keep the party in safe and close custody; for, if every jailer be bound by law to keep his prisoner in such custody, surely it can be no fault in a mittimus to command him to do so. It ought to set forth the crime alleged against the person with convenient certainty, whether the commitment be by the privy council or any other authority; otherwise the officer is not punishable by reason of such mittimus for suffering the party to escape, and the court before whom he is removed by habeas corpus ought to discharge or bail him. And this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth that the court cannot adjudge whether it were a reasonable ground of imprisonment."

Allen v. Hagen, 62 N. E. 1086; 170 N. Y. 46.

(Citing 2 Hawk. P. C. p. 119, c. 16.)

"A commitment, in the absence of any statutory provisions prescribing its form and contents, does not sufficiently state the offense by simply designating it by the species or class of crimes to which

the commiting magistrate may consider it to belong, but in order to be a sufficient or valid commitment it ought to state the facts charged or found to constitute the offense with sufficient particularity to enable the court, on a return to the habeas corpus, to determine what particular crime is charged against the prisoner."

State v Birchim, 9 Nev. 95, 100.

A commitment issuing from inferior courts must state the offense with reasonable certainty; failing which it is void.

Hurd on Habeas Corpus, 2nd Ed. page 371.

A comparative view of the alleged "judgment" in the docket (page 28 Tr.) with the "certified copy" page 21, Tr.), and in the trial judge's affirmance (page 39-45 Tr.), shows: The "judgment" in the docket does not contain a statement of any crime; the "certified copy" contains the statement "a criminal action for the crime of violating the Alaska Bone Dry Law"; the district judge, finding that he has "no jurisdiction", then affirms the "judgment", minus the crime, by affirming a different penalty; in the "judgment" the justice adjudges that the defendant be "imprisoned in jail", whereas the "certified copy" says "imprisoned in the jail at Sitka" for four months, while the district judge's order of affirmance says "three months confinement in the jail at Juneau, Alaska"; the "judgment' 'orders that defendant "be imprisoned in jail until such fine and costs be paid"; the order of affirmance omits that clause entirely; etc., etc.

In re John Bonner, 151 U. S. 242; 38 L. Ed. 149.

Execution of judgments in criminal cases are pro-

vided for in chapter 20, Sec's. 2305-10, Code Crim-Pro., Compiled Laws of Alaska, 1913.

"Sec. 2305. That when a judgment, except of death, has been pronounced, a certified copy of the entry thereof upon the journal must be forthwith furnished by the clerk to the officer whose duty it is to execute the judgment; and no other warrant or authority is necessary to justify or require its execution."

"Sec. 2309. That a judgment in a criminal action, so far as it requires the payment of money, whether the same be a fine or costs and disbursements of the action ,or both, in addition to the means in this chapter provided, may be enforced as a judgment in a civil action."

Judgments are enforced in civil actions as provided in Chap. 96, Code Crim. Pro., Secs. 1813-1826, Compiled Laws of Alaska, 1913.

So much of the justice's judgment against defendant as requires him to be imprisoned in jail, or "in jail at Sitka", or "in jail at Juneau, until such fine and costs be paid," is void.

Booth v. United States, 197 Fed. 283; 287.

State v. Shepard, 15 Ore. 508; 16 Pac. 483.

The commitment is void, (1) because it is not a "certified copy of the entry of judgment" (Sec. 2541), (2) because it does not state any crime known to our law, nor any crime within the jurisdiction of the justice, nor at all, (3) because it does not conform to the statutory requirements so as to make the marshal responsible under his bond in case of refusal to comply with it, nor to protect him in false imprisonment, (4) because it is in plain violation

of the statute, and (5) because, not being a true and correct "certified copy", and being otherwise in violation of the statute, it is not a valid "execution against the property of the defendant for the purpose of collecting the amount of any fine or costs mentioned therein." (Sec. 2541.)

15. "Alaska Bone Dry Law" Repealed.

The "Alaska Bone Dry Law", to-wit, the Act of Congress entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," 39 Stat. L. 903, approved Feb. 14, 1917, was repealed by the 18th amendment to the Constitution of the United States, and by the provisions of the National Prohibition Act, entitled "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries." 41 Stat. L. 305, approved Oct. 28, 1919.

Abbate v. United States, 270 Fed. 735. (Dissenting opinion, pp 737-740.)

16. Appellant Is Imprisoned in Violation of the Constitution.

The appellant is imprisoned on a complaint which does not state facts sufficient to constitute a crime and which was filed in the action against him in violation of the express provisions of the law; under a warrant of arrest which does not state probabe cause on oath, and does not state any crime of which the appellant is accused and which was issued in violation of the express provisions of the law; un-

der a verdict which does not state any crime of which the appellant was found guilty by the jury, and which was received and filed in violation of law; under a pretended judgment which does not state the time or place when and where appellant committed any crime, nor the name nor the character of the crime of which it is pretended this appellant is guilty, and is void because the said judgment was entered in this case in violation of the express provisions of the statute; under a pretended commitment which was issued in violation of the express provisions of the statute, and which does not state the crime for which the appellant is imprisoned, nor the time nor place where it was committed.

Appellant's constitutional rights are violated in this:

First. The appellant is imprisoned in violation of the law of the land and without due process of law, and in violation of his rights under the Fifth Amendment to the Constitution of the United States.

Second. The appellant is imprisoned in violation of the law of the land, and in violation of his rights under the Sixth Amendment to the Constitution of the United States, because he has not been and is not now informed of the nature and cause of the accusation against him in this case.

Wherefore appellant is entitled to be discharged on the writ of habeas corpus in this case.

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